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No. 90-1774

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

LEWIS STEPHEN WORK, et al.,

Petitioners,

vs.

TYSON FOODS, INC.; CITY OF GREEN FOREST, ARKANSAS; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A.

WHETHER A CITIZEN SUIT BROUGHT UNDER 33 U.S.C. § 1365 CAN BE PRECLUDED BY THE ENTRY OF A CONSENT DECREE BETWEEN THE EPA AND AN ALLEGED POLLUTER IN AN ACTION INITIATED BY THE EPA AFTER THE CITIZEN SUIT WAS FILED.

B.

WHETHER AN APPELLATE COURT CAN DENY ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL BY CITIZEN PLAINTIFFS IN A SUIT BROUGHT PURSUANT TO THE CLEAN WATER ACT.

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STATEMENT OF THE CASE

On March 3, 1987, approximately 100 residents of an area east of the small town of Green Forest, Arkansas filed suit in the United States District Court for the Western District of Arkansas against Tyson Foods, Inc., the City of Green Forest, and 18 other defendants, seeking relief under the Clean Water Act, 33 U.S.C. § 1251, et seq., as well as under a number of other federal and state statutes and the common law of the State of Arkansas. The plaintiffs, petitioners here, alleged that their groundwater was polluted as a result of Tyson Foods' discharge into the City's publicly owned treatment works (POTW) of greater quantities of waste than the POTW was capable of handling. The plaintiffs sought declaratory and injunctive relief, the imposition of civil penalties, compensatory and punitive damages and attorney's fees.

On September 28, 1987, the United States of America, at the request of the Environmental Protection Agency (EPA), filed suit in the same court against the City of Green Forest and the State of Arkansas pursuant to the Clean Water Act. The government also sought injunctive relief and the assessment of civil penalties against the City of Green Forest for its discharge of pollutants in violation of the Act.

On January 28, 1989, the government lodged a proposed consent decree settling its enforcement action. Notice of the lodging of the proposed decree was published in the Federal Register on February 21, 1989. On March 17, 1989, the plaintiffs filed a motion seeking to intervene in the EPA action and setting forth their objections to the proposed consent decree. In an order entered

on March 24, 1989, the district court denied the motion for intervention. The consent decree was subsequently approved by the court and filed on March 29, 1989.

Before trial commenced in the citizen suit, the City of Green Forest filed a motion for partial summary judgment, seeking dismissal of the plaintiffs' Clean Water Act claims on the basis of collateral estoppel and res judicata. Agreeing with the City's position that the plaintiffs were seeking the same relief for the same alleged violations of the Clean Water Act as had been sought by the EPA in the government enforcement action and that resolution of those issues by entry of the consent decree barred the plaintiffs from proceeding with their Clean Water Act claims, the district court granted the City's motion and dismissed with prejudice that portion of the complaint seeking relief against the City under the Clean Water Act. The plaintiffs were permitted to proceed against the City on all other claims stated in the complaint, although the case went to the jury (as against the City) only on the plaintiffs' claim for damages based upon inverse condemnation. The jury returned a verdict in favor of the City on the inverse condemnation claims.

The plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. As against the City, the plaintiffs argued, first, that the trial court erred in denying intervention in and consolidation with the EPA action; second, that the district court erred in granting partial summary judgment in favor of the City on the Clean Water Act claims; and third, that the inverse condemnation claim was submitted to the jury under improper instructions. In an opinion filed December 18, 1990, the Eighth Circuit Court of Appeals held that the

lower court properly denied the motion to consolidate. It also found that the district court correctly dismissed the citizens' Clean Water Act claims on grounds of res judicata. The appellate court further held that the trial court erred in denying the plaintiffs' motion to intervene in the government enforcement action, but found the error harmless except to the extent that the ruling prevented the plaintiffs from seeking attorneys' fees. Thus, the Court of Appeals remanded the case in order to allow the plaintiffs to attempt to recover fees. The Court of Appeals also reversed and remanded on the plaintiffs' inverse condemnation claims, finding that the trial court submitted that theory to the jury under erroneous instructions.

Both the citizen-plaintiffs and Tyson Foods, Inc. have petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Tyson's petition raises Clean Water Act issues which do not affect the City and, thus, the City makes no response to Tyson's petition. The plaintiffs present three questions for review, but only the first and the third of those three questions call for a response by the City.

ARGUMENT

A.

WHETHER A CITIZEN SUIT BROUGHT UNDER 33 U.S.C. § 1365 CAN BE PRECLUDED BY THE ENTRY OF A CONSENT DECREE BETWEEN THE EPA AND AN ALLEGED POLLUTER IN AN ACTION INITIATED BY THE EPA AFTER THE CITIZEN SUIT WAS FILED.

On September 28, 1987, the EPA filed suit in the United States District Court for the Western District of

Arkansas against the City of Green Forest. The action was brought pursuant to the Clean Water Act, 33 U.S.C. § 1319, and sought injunctive relief and civil penalties, alleging violation of the NPDES permit issued by the EPA to the City of Green Forest. The United States of America sought the same relief for the same alleged violations of the Clean Water Act that the petitioners were seeking in a suit they had filed against the City (and others) on March 3, 1987. On March 29, 1989, a consent decree was entered in the EPA action filed against the City. The City then filed a motion for partial summary judgment in the plaintiffs' suit, seeking dismissal of the plaintiffs' Clean Water Act claims against the City on the basis of collateral estoppel and res judicata. The trial court granted the City's motion and dismissed with prejudice that portion of the complaint seeking relief under the Clean Water Act. The plaintiffs were allowed to proceed against the City on all other claims stated in the complaint. On appeal, the Eighth Circuit Court of Appeals held that the trial court properly dismissed the Clean Water Act claims against the City on grounds of res judicata.

The petitioners now ask this Court to review the question whether the entry of a consent decree in a Clean Water Act case commenced by the EPA subsequent to the filing of a citizen suit under that Act may have a res judicata effect on the citizen suit. In their brief, the petitioners focus on the role which they contend a citizen may take when the government fails to act within the sixty day period after notice of intent to sue is given pursuant to 33 U.S.C. § 1365(b). The petitioners maintain that under the Eighth Circuit's ruling, citizen suits would

be barred from proceeding whenever the EPA subsequently commences and settles an enforcement action. The City submits that the petitioners misconceive the role which citizens are to play under the enforcement mechanism of the Clean Water Act and, further, misread the scope of the appellate court's ruling.

As the Eighth Circuit noted in its opinion, the Clean Water Act is intended to be enforced primarily by the United States government. Thus, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court stated:

> The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit.
>
> 484 U. S. at 60.

In *Gwaltney*, this Court held that to permit citizen suits for wholly past violations of the Act "could undermine the supplementary role envisioned for the citizen suit." 484 U.S. at 60.

The United States District Court for the Southern District of New York's well-spoken comments in *Hudson River Fishermen's Association v. County of Westchester*, 686 F. Supp. 1044 (S.D. N.Y. 1988) amplify the reasons for delegating to private citizens a secondary, rather than a primary, role. Responding to the Fishermen's Association's argument that dismissal of its suit would leave the group without a remedy, the Court declared:

> We are particularly unimpressed with this latter argument. The thrust of the CWA is to

> provide *society* with a remedy against polluters in the interest of protecting the environment. Section 101 of the CWA, 33 U.S.C. § 1251(a). If the Government's action achieves that end, the fact that HudFish or any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh. The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void. That does not mean, however, that HudFish is *ipso facto* entitled to its own, "personalized" remedy in this or any other CWA case. 686 F. Supp. at 1052.

The argument advanced by the Fishermen's Association parallels quite closely that made by the petitioners in this case. The citizens here object to the fact that they were not able to dictate the terms of the settlement which was ultimately reached with the City of Green Forest. Yet, the cases clearly hold that citizen groups have no right to prescribe the terms of a settlement. Even when citizens are permitted to intervene in government enforcement actions, they have no veto power over a settlement negotiated between the government and a defendant. *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067 (W.D. N.Y. 1982); *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977). Furthermore, civil penalties assessed under the Clean Water Act are not payable to individual citizens, but to the United States Treasury. *Gwaltney, supra*; *Sierra Club v. Electronic Controls Design*, 703 F. Supp. 875 (D. Or. 1989).

Had the EPA filed its action within sixty days after the petitioners gave notice of their intent to sue, the citizens would not have been permitted to file suit to redress alleged Clean Water Act violations, but would have been relegated to the role of intervenors. As has already been pointed out, the petitioners, as intervenors, would have had no right to dictate the terms of any settlement. For whatever reason, perhaps a lack of resources or a prioritizing of violations demanding immediate action, the EPA did not file suit against the City until September of 1987, six months after the citizens filed their suit. Given the fact that citizen groups do not have veto power over settlements negotiated by the government in cases where citizens are permitted to intervene, why should this group of individuals have such power simply because the EPA did not file its suit until six months after the petitioners' action was commenced? The petitioners argue that the Eighth Circuit's decision creates a new *limitation* on citizens' rights to maintain an action under the Clean Water Act. The City submits that the adoption of the citizens' argument would create a new *right* in citizen groups – the right to redress in their own action the very claims resolved by a consent decree negotiated in good faith and at arms length between the EPA and the defendant. There is simply no basis for engrafting such a right into the framework of the Clean Water Act.

The petitioners state in their brief that the decision reached by the Eighth Circuit Court of Appeals on this issue is contrary to the decisions of other courts and that there is no authority for the holding below. The petitioners fail to mention the decision of the United States District Court for the Northern District of Alabama in

United States v. Olin Corporation, 606 F. Supp. 1301 (N.D. Ala. 1985), upon which the Eighth Circuit placed substantial reliance. In that case, the State of Alabama and the United States sought injunctive relief to require Olin Corporation to eliminate DDT from and restore the environment in the vicinity of Redstone Arsenal. As part of the resolution of the case, Olin, the United States and Alabama entered into a consent decree. After making the decree available for public comment, the court entered it on May 31, 1983. The previous January, the plaintiffs had filed a separate action against Olin for injunctive relief requiring Olin to remove DDT from the affected area. Olin filed a motion for summary judgment, arguing that the citizen suit was barred by res judicata.

The trial court granted Olin's summary judgment motion, holding that because the plaintiffs sought the same relief as that requested and attained by the government in the earlier litigation, the plaintiffs' claims were barred by res judicata. In reaching its decision, the court noted that the weight of authority indicates that when a state or the federal government represents all of its citizens in a *parens patriae* suit, a consent decree entered in such a suit is conclusive upon those citizens and is binding upon their rights. Explaining the concept, the court stated that in a proper *parens patriae* action, a government is deemed to represent all of its citizens when the government is a party in a suit involving a matter of sovereign interest, and there is a presumption that the state will adequately represent the position of its citizens. It noted that *parens patriae* lawsuits traditionally involve a government suing to enjoin alleged nuisances caused by air or

water pollution. The *parens patriae* concept was also recognized by the Second Circuit Court of Appeals in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984). Furthermore, res judicata principles were similarly applied to bar certain citizens' claims in *Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D. N.J. 1985). *See also, Missouri Coalition for the Environment v. Corps of Engineers*, 866 F. 2d 1025 (8th Cir. 1989); *United States v. Ketchikan Pulp Co., supra.*

To support their argument, the petitioners cite *Atlantic States Legal Foundation, Inc. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988) and *Chesapeake Bay Foundation, Inc. v. American Recovery Co., Inc.*, 769 F.2d 207 (4th Cir. 1985). Rather than addressing the issue raised here, those cases dealt only with the question whether a subsequently filed government enforcement action compels the dismissal of a citizen suit. It is one thing to say, as those cases did, that a subsequently filed EPA action does not per se bar a pending citizen suit; it is quite another to extend those holdings, as petitioners would have this Court do, to allow a citizen suit to proceed after a consent decree has been reached between the EPA and the polluter.

Sierra Club v. Coca-Cola Corporation, 673 F. Supp. 1555 (M.D. Fla. 1987), which the petitioners also cite in their brief, is likewise distinguishable. While that case found that a consent decree entered into between the EPA and Coca-Cola did not affect the rights of the citizen group, the citizen suit there had been consolidated with the EPA's action. Here, the citizens' motion to have their case consolidated was denied and the denial was upheld by

the Eighth Circuit Court of Appeals as a proper exercise of the district court's discretion, given the interests of expedition and economy. (App. 16)

The City would also point out to this Court the fact that the citizens who object to the preclusive effect given to the consent decree in this case did have a voice in the settlement of the government's enforcement action. On January 28, 1989, the government lodged its proposed consent decree settling the enforcement action it had prosecuted against the City of Green Forest. Notice of the lodging of the consent decree was published in the Federal Register on February 21, 1989, as required by 28 C.F.R. § 50.7. On March 17, 1989, the citizens filed their objections to the proposed consent decree. The decree was thereafter approved by the district court and filed on March 29, 1989.

In their brief, the petitioners complain that they were denied a hearing in which to present their position and arguments. (Petitioners' Brief, p. 17) Yet, the petitioners never requested an evidentiary hearing. Furthermore, the regulations promulgated with regard to consent judgments in actions such as this one say nothing of a right to a hearing. Rather, 28 C.F.R. § 50.7 provides for an opportunity on the part of persons not parties to the action "to comment" on the proposed judgment prior to its entry by the court. The regulation goes on to state that prior to the entry of the consent judgment, "the Department of Justice will receive and consider, and file with the court, any *written comments, views or allegations* relating to the proposed judgment." (emphasis supplied)

Lastly, the City notes that the scope of the Court of Appeals' ruling in this case is limited. The Eighth Circuit's decision cannot fairly be read to bar every citizen suit from proceeding whenever the EPA subsequently commences and then settles its own enforcement action. Certainly, if the citizen suit seeks to redress different violations of the Clean Water Act or if it seeks a different type of relief, then res judicata or collateral estoppel principles will not apply. Also, the appellate court's ruling will not prevent citizens from maintaining a suit to enforce the terms and provisions of a consent decree. In short, the decision of the Eighth Circuit is limited to its facts. In this case, the citizens admittedly sought to redress in their action the very violations which were covered by the consent decree negotiated between the City and EPA. Under long-standing principles of res judicata and collateral estoppel, the Eighth Circuit properly found that the City should not twice be forced to defend itself against the same allegations of wrongdoing, nor should it twice be subjected to civil penalties or other relief for the same violations of the Clean Water Act.

B.

WHETHER AN APPELLATE COURT CAN DENY ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL BY CITIZEN PLAINTIFFS IN A SUIT BROUGHT PURSUANT TO THE CLEAN WATER ACT.

The petitioners also ask this court to review the propriety of the Eighth Circuit Court of Appeal's denial of their motion for attorney's fees and costs incurred on appeal from the district court judgment. On December 18, 1990, the Eighth Circuit Court of Appeals filed its opinion

in this case, affirming in part, reversing in part and remanding for further proceedings the judgment of the district court. The petitioners filed a motion for attorney's fees, costs and expenses, seeking to recover $85,686.00 in attorney's fees (together with any enhancement which might be determined by the court) and $10,775.94 in costs and expenses incurred in connection with the appeal of this case to the Court of Appeals. The City of Green Forest responded to the motion and on February 25, 1991, the Eighth Circuit entered an order directing that each party bear his or its own costs. (App. 43) Petitioners' subsequent motion for clarification or reconsideration was denied by the Court of Appeals in an order filed March 27, 1991. (App. 82)

The petitioners maintain that they are entitled to attorney's fees pursuant to 33 U.S.C. § 1365(d), which provides:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

The petitioners assert that they are the prevailing parties in this litigation and, thus, that the Eighth Circuit Court of Appeals improperly denied their motion for fees and costs. The City of Green Forest submits that the Court of Appeals' order that each party bear its own fees and costs for work performed by its counsel in connection with the appeal was entirely proper and does not merit review by this Court.

The first fact to bear in mind in analyzing this question is that the petitioners' case sought relief not only under the Clean Water Act, but also under a number of other federal and state statutes and under the common law of the State of Arkansas. Two of the four issues raised against the City on petitioners' appeal to the Eighth Circuit arose out of the Clean Water Act; the other two concerned the petitioners' claim against the City for inverse condemnation. The motion for fees and costs submitted by the petitioners included time spent on *all issues* involved in the appeal, not just time spent in connection with Clean Water Act issues. There is no statutory basis for petitioners' recovery of fees and costs in connection with their common law claims against any of the defendants. *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority*, 765 F.2d 1169 (D.C. Cir. 1985).

Secondly, the petitioners did not substantially prevail against the City on their Clean Water Act claims. With regard to the Clean Water Act, the petitioners argued on appeal (1) that the district court erred in denying their motion to intervene in the enforcement action filed by the EPA and/or erred in refusing to consolidate the government's case with the citizens' suit, and (2) that the trial court erred in granting summary judgment in favor of the City on the citizens' Clean Water Act claims. The Eighth Circuit Court of Appeals agreed with the district court that the doctrine of res judicata barred the citizens' Clean Water Act claims against the City and, thus, that the lower court correctly granted summary judgment against the City on that issue. The appeals court also found that the district court properly exercised its discretion in

denying the citizens' motion to consolidate the EPA and citizens' suits. The only issue on which the petitioners can conceivably argue that they prevailed as against the City of Green Forest was on the intervention issue. Yet, even though the Court of Appeals held that the lower court erred in denying the citizens leave to intervene in the EPA action, it found that the denial "for the most part, was harmless error. . . . " (App. 13)

Next, consideration must be given to the language of Rule 39(a) of the Federal Rules of Appellate Procedure, which governs the taxation of costs on appeal. The Rule provides in pertinent part, " . . . if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." Under Rule 39(a), if a judgment is affirmed, costs are taxed against the appellant. If a judgment is reversed, costs are taxed against the appellee. If, as in this case, a judgment is affirmed in part and reversed in part, the award of costs is entirely discretionary with the court and, in general, equitable considerations mandate that each party bears its own costs. *See, e.g. Matter of Penn Central Transportation Co.*, 630 F.2d 183 (3d Cir. 1980).

The City would also point out that the cases on which the petitioners rely concern the recoverability of fees and costs in connection with work performed at the trial court level. For example, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the issue was the plaintiffs' entitlement to attorney's fees for work performed at the district court stage of the proceedings. This Court should be aware of the fact that on September 21, 1989, shortly after judgment was entered by the district court, the petitioners filed with that court an application for attorney's fees in

the amount of $348,759.89 (plus any enhancement which might be determined by the court) and costs in the amount of $80,043.92. On petitioners' motion, a consideration of that fee application was stayed pending the outcome of the appeal. Now that the appeal has been concluded, the petitioners most certainly will ask the district court to rule on the pending fee request. Furthermore, as a result of its decision that the trial court erred in denying the citizens leave to intervene in the EPA action, the Eighth Circuit Court of Appeals remanded this case to the district court for the purpose of allowing the citizens to seek attorney's fees for their efforts "in spurring the EPA into finally taking action against the City." (App. 15) Thus, on remand, the petitioners will be permitted to seek fees against the City of Green Forest for at least some of the work performed in connection with this matter.

Finally, this respondent would emphasize that an award of attorney's fees under the Clean Water Act is not mandatory, but is discretionary. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128 (11th Cir. 1990). Under 33 U.S.C. § 1365(d), the court *may* award costs of litigation if the court determines such an award to be *appropriate*. More significantly, Federal Rule of Appellate Procedure 39(a) vests complete discretion as to the taxing of costs in the appellate court, especially in cases which are affirmed or reversed in part. In cases like this one, where the judgment of the district court is affirmed in some respects, reversed in others and remanded for further proceedings, the appellate courts routinely require each party to bear its own costs, including attorney's fees. Given the disposition made by the Eighth Circuit Court

of Appeals in this case, an explanation of its ruling with respect to fees and costs simply was not necessary.

CONCLUSION

A review on writ of certiorari is not a matter of right, but of judicial discretion. Under the Rules of this Court, a petition for writ of certiorari will be granted only when there are special and important reasons therefor. In this case, the petitioners have been unable to demonstrate a conflict among the United States Courts of Appeal on any of the questions presented. They have not established that the decision of the Eighth Circuit Court of Appeals conflicts with any applicable decision of this Court. As the City has explained in its brief, the Court of Appeals correctly applied the statutory provisions of the Clean Water Act, the case law and the appropriate rules of procedure in reaching its decision in this case. For all of the reasons discussed herein, the City of Green Forest respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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